California Law Review

Volume 12 | Issue 5 Article 3

July 1924

Theory of Chancery in Protecting against the Cestui Que Trust One Who Purchases from a Trustee for Value and without Notice

George P. Costigan Jr.

The Theory of Chancery in Protecting against the Cestui Que Trust One Who Purchases from a Trustee for Value and Without Notice

WHILE so much has been written on the subject of purchase for value without notice in the law of trusts that little that is not a mere change of emphasis can be contributed to prior discussions, some good may nevertheless result from stressing known factors of the situation differently.

The first thing to do in confronting the subject would seem to be to scrutinize one or two terms carefully. By this is not meant that the words "purchase," "value" and "notice" must each be defined, though each word presents difficulties, but that such a vague expression as "equal equities" must be given definite mental evaluation and the relation of "equal equities" and of "estoppel" to the trust concept must be delimited. Moreover, supposedly fundamental postulates, namely, that "where equities are otherwise equal, prior in time is prior in right" and that "as between equal equities, the legal title shall prevail," even though one equity is prior in time to the other, must be tested in their operation to see whether they deserve full or any acceptance.

In the phrase "equal equities" it is the word "equities," as distinguished from the word "equal," that seems to cause greater difficulty of definition, though perhaps not of application. We can understand the "equity" of a cestui que trust or of any other person to whom the chancellor will award one of his remedies. In that sense, the equity is the right for which that cestui is privileged to get relief in Chancery. But what is meant by the "equity" of an innocent purchaser for value who gets the legal title? By the theory of our doctrine of merger, if it can be supposed, as on principle it cannot, that with the legal title he gets an equitable interest which the chancellor will affirmatively assist, that equitable interest is swallowed up in the legal and ceases to exist. As a matter of fact, it would seem that such innocent purchaser for value does not get the equitable interest lost by the cestui when the legal title is conveyed, but instead gets an unencumbered legal title, the outstanding equitable interest

perishing. But even if that is controverted, still on either supposition, when the innocent purchaser for value finds himself with the unencumbered legal title and, because of merger, with no separate equitable interest, in what sense has he an "equity"? Only in the sense that he is worthy of considerate treatment, i.e., has acquired merit in the eyes of the chancellor, because he has innocently parted with value for the particular property in question. That this equity is in no sense a property right is apparent when a bona fide purchaser for value is contrasted with a mala fide one. Each has the legal title, but the bona fide purchaser has a merit which enables him to retain that legal title while the mala fide purchaser, lacking such merit, must yield it up. The bona fide purchaser's kind of an equity is quite different from the cestui's equity, for it is virtue instead of property or quasi-property; it is defensive not affirmative—a shield and not a sword. The equities of the parties are "equal" when the defense offsets the attack, i.e., when the chancellor says to the complainant, "Your merit and your property or quasi-property rights as a cestui que trust are in my eyes precisely offset for defensive purposes by the merit of the defendant as a purchaser in innocently parting with value, and for that reason I cannot give you relief against him." As Vice-Chancellor Kindersley has so well said in Rice v. Rice:[1]

> "For when we talk of two persons having equal or unequal equities, in what sense do we use the term 'equity'? For example, when we say that A has a better equity than B, what is meant by that? It means only that, according to those principles of right and justice which a Court of Equity recognizes and acts upon, it will prefer A to B, and will interfere to enforce the rights of A as against B. And therefore it is impossible (strictly speaking) that two persons should have equal equities, except in a case in which a Court of Equity would altogether refuse to lend its assistance to either party as against the other. If the Court will interfere to enforce the right of one against the other on any ground whatever, say on the ground of priority of time, how ean it be said that the equities of the two are equal; i.e., in other words, how can it be said that the one has no better right to call for the interference of a court of equity than the other"?[2]

In discussing the rule that "where equities are equal, the legal title prevails," Lindley, L. J., said in Bailey v. Barnes,[3] "Equality means

---

[1] (1854) 2 Drewry, 73, 77, 2 Eq. R. 341, 23 L. J., Ch. 289, 61 Eng. Rep. R. 646.

[2] Id., 77-78. "The equity is equal between persons who have been equally innocent and equally diligent." Per curiam in Maina v. Elliott (1875) 51 Cal. 8, 11.

[3] [1894] 1 Ch. 25, 36, 63 L. J., Ch. 73, 7 R. 9, 69 L. T. 542.

the non-existence of any circumstance which affects the conduct of one of the rival claimants, and makes it less meritorious than that of the other."

But then it has been suggested that, because of supposed estoppel on the cestui que trust, the innocent purchaser for value has not merely an equity equal to that of the cestui que trust but one that is greater.[4] That compels consideration of the question, how far does the nature of a trust permit the application to the cestui of estoppel doctrines? In other words, from the mere fact that there is a trust may we estop the cestui as against third persons who deal with the trustee? Does the bare fact of a trust plus wrong action by the trustee mean lack of merit on the part of the cestui? We assume, of course, a secret trust,—by which is meant here a trust which the purchaser for value did not know, and could not be expected to know, existed. The cestui of such a trust may be an infant or insane, or both, or a sane and in every way responsible adult. If an estoppel doctrine as such is to be applied properly, the infant and the lunatic must be made exceptions, yet as things now stand the bona fide purchaser for value who gets title from the trustee prevails over infant and lunatic cestuis que trust. That fact points rather clearly to the merit of the defendant, rather than the demerit of the complainant, as the important thing in the doctrine of purchase for value without notice. But even in the case of the sane adult cestui, is it fair to apply the estoppel doctrine without important reservations? If the sane adult cestui established the trust for himself and the offending trustee was one selected by him, or, by the terms of the trust, could have been displaced by him at any time through the appointment of another, estoppel might conceivably be deemed a sufficient ground for regarding such cestui as inferior in equity to the innocent purchaser, though in England, at least, it is not such a ground and in this country, in general, is not. But even so, since the vast majority of trusts are created for cestuis by others, that extreme case, practically negligible in extent in this country, it would seem, has merely the effect of making us certain of the impropriety of applying the estoppel test against a cestui who neither selects nor can control the trustee and who is, after all, the typical kind of cestui que trust. The secret passive trust created by the trustor for himself as cestui has long ceased to be the important kind of secret trust where either real property or personal property is concerned,

[4] See Ewart on Estoppel, chapters XVIII, XIX, XX. For a recent presentation of the estoppel view see Henry W. Ballantine, Purchase for Value and Estoppel, 6 Minnesota Law Review, 87.

and, moreover, in many places passive trusts of real property are forbidden or are practically impossible,[5] except in the form of constructive trusts, and also, where such trusts are allowed, of resulting trusts. The normal trustee is not a mandatory of the cestui and, unless the latter knows or refuses to know what reasonably he should ascertain about the trustee's prospective wrongdoing, the cestui should not be estopped to cling to whatever advantage of position he finds himself possessed of when the trustee's wrongdoing is uncovered.

Whether their origin be deemed good or bad, express trusts have been retained and developed as desirable property holding devices, and it may well be said that their effective operation and highest development require that the cestui be relieved of any estoppel blame when he does not know and has no reason to suspect that his trustee is doing, or is going to do, wrong. That is clearly what the English Court has had in mind in several cases now to be noted.

In Shropshire Union Railways and Canal Company v. The Queen,[6] Lord Chancellor Cairns said that the argument in behalf of the respondent in that case appeared to him

> "to go almost to this, that whenever you have an equitable owner who is the absolute owner, that is to say, entitled to the whole equitable interest, such a person ought not to have a trustee at all holding the *indicia* of legal ownership; or, if he chooses, for his own purpose, to have such a trustee, he must be in danger of suffering for every act of improper conduct by that trustee; and that, therefore, if the person entitled absolutely to the equitable interest in a share in a railway company, chooses for his own purpose to have that share standing in the name of a trustee for him, he will be bound not merely by a valid legal transfer of that share by the trustee, but by any equitable dealing or contract which the trustee may choose to enter into. My Lords, that is a very serious proposition. It goes not merely to shares, but it goes to land, and to every other species of property; and it goes to say that, whereas there is a large, well-known, recognised, and admitted system of trusts in this country, that system of trusts is to be cut down and moulded and reduced to this, that it is to be a system applicable only to infants, married women, or persons with limited interests; and that wherever the limited interest has ceased, and the equitable interest has become entire and complete without any limit, there the equitable owner is under some measure of obligation with regard to his duty of watching his trustee, an obligation which does not lie upon a limited owner. I find no authority for such a proposition, and I feel satisfied

---

[5] Bogert on Trusts, p. 155.
[6] (1875) L. R. 7 H. L. 496, 507, 45 L. J., Q. B. 31, 32 L. T. 283.

that your Lordships will not be disposed to introduce, for the first time, that as a rule of law."

In Burgis v. Constantine,[7] Fletcher Moulton, L. J., said:

"The defendant's counsel has endeavored to bring the case within certain equitable doctrines, the effect of which, on proper occasions, is that an equity subsequent in point of time will be put in a position of priority in point of law to an equity prior in point of time, and even, in certain special cases, to the legal title. But in the cases in which this has been done there has, I think, always been something in the nature of negligence on the part of the owner of the equity prior in point of time. Here, in my opinion, there is no room for the suggestion that the cestui que trusts were guilty of any negligence. A person is entitled to leave his property, whatever it may be, in the name of a trustee. A vast amount of property in this country must be in the names of trustees."

And Farwell, L. J., said:

"As has been pointed out by Lord Cairns in Shropshire Union Railways and Canal Co. v. The Queen,[8] the mere fact that a person has transferred the legal ownership of stock or shares or other property, real or personal, to a trustee, and given him the title deeds, or the securities, or other indicia of title, does not justify any one in assuming that the person to whom such transfer is made is the beneficial owner. If the trustee does, in fact, deal with the property, and convey the legal ownership to a bona fide purchaser or mortgagee for value without notice, the cestui que trust has to bear the loss. If such a subsequent purchaser or mortgagee does not get the legal estate it is because he has not taken those precautions which the law allows him in order to protect himself from all risks; and he cannot set up the apparent ownership of the trustee as evidence of any misconduct or negligence on the part of the beneficial owner, because it is in accord with the usages of mankind that the legal estate in property should be conveyed to, and the indicia of title deposited with, trustees, and no other member of the community, therefore, is entitled to allege that such a course of action constitutes any invitation to him from which a duty towards him can be inferred."[9]

In Cory v. Eyre,[10] Turner, L. J., said:

"The very first principle of trusts is, that the *cestui que trust* places confidence in his trustee, and if it is to be held that a *cestui que trust* is to be postponed upon the mere ground that he did not inquire into the acts or conduct of his trustee, that principle would, as it seems to me, be in a great measure, if not wholly, destroyed."

---

[7] [1908] 2 K. B. 484, 498, 77 L. J., K. B. 1045, 99 L. T. 490, 24 T. L. R. 682.

[8] Supra, n. 6.

[9] [1908] 2 K. B. 484, 501.

[10] (1863) 1 De G. J. & S. 149, 169, 46 Eng. Rep. R. 58.

In Hill v. Peters,[11] Eve, J., said:

"There is nothing to prevent an individual, if he is so minded, from vesting any item of his property in another person as a trustee, and if he so does, the trustee is the proper custodian of the documents of title and other indicia of ownership. Moreover, the settlor is justified in adopting an attitude consistent with a belief on his part in the honesty of the individual whom he has appointed trustee. He is entitled to act on the footing that he has selected an honest man for the position, and not the less so because the person selected happens to be his own solicitor. Further, it is contrary to well-recognized practice to introduce into the transaction any notice of the existence of the trust by an indorsement on the title deeds or otherwise. If authority is needed for these several propositions, it is to be found in *Cory* v. *Eyre*,[12] *In re Richards*,[13] *Shropshire Union Railways and Canal Company* v. *Reg.*,[14] *Bradley* v. *Riches*,[15] and *Carritt* v. *Real and Personal Advance Company*."[16]

Trustees quite often are court approved or court appointed, and, as to those, it is the chancellor, and not the cestui, who is responsible for the trustee and morally blameable, if there can be moral blame in such case, for the trustee's unexpected wrong doing. But even where the trustee is privately selected, without the court being apprised of the trust's existence, the trustee is in all probability only rarely subject to the domination of right of the cestui, and, except in such rare cases, and unless the cestui raises no protest against what he knows or has reason to believe the trustee contemplates doing, it would seem quite inconsistent with the essential nature of a trust to apply to the cestui the doctrine of estoppel in order to give him an inferior equity. As a matter of fact, under the commonly accepted doctrines, there is no need even to attempt to fasten on him such inferiority except where the purchaser acquires only an equity, and that is just the situation where it seems on principle undesirable to do so. Professor Huston has pointed out what is the fundamental problem, namely, to what extent shall a trust be brought within that principle of public policy which favors the free exchange of property? That is, how far is the trust to be embraced in the "effort to ensure security in commercial transactions and

---

[11] [1918] 2 Ch. 273, 277, 87 L. J., Ch. 584, 62 S. J. 717.

[12] (1863) 1 De G. J. & S. 149, 165.

[13] (1890) 45 Ch. D. 589, 594-595, 59 L. J., Ch. 728, 63 L. T. 451.

[14] (1875) L. R. 7 H. L. 496, 507-508.

[15] (1878) 9 Ch. D. 189, 47 L. J., Ch. 811, 38 L. T. 810.

[16] (1889) 42 Ch. D. 263, 269-270, 58 L. J., Ch. 688, 61 L. T. 163. Hill v. Peters, supra, n. 11, from which the above quotation is taken is of special interest because it cherishes trusts to the extent of holding as to the rule of Dearle v. Hall (1828) 3 Russ. 1, 48, 38 Eng. Rep. R. 475, much followed in

acquisitions by imposing certain responsibilities on owners of property with respect to that property as a price of legal protection to their interests in it"?[17] One who is enthusiastically for the wide extension of such security will be for it even in the case of trusts and will argue for estoppel of the sui juris cestui even where he did not know and did not suspect the need of acting to prevent the estoppel situation, or will be for the perhaps still broader principle that the cestui must be bound by all the acts of the trustee where the party dealing with him paid full value and had neither actual nor constructive notice of the trust. Such a one will deem the equity of the purchaser greater than that of the cestui, and the law may some day embody that idea.[18] But that day seems far off, or, as Professor Huston expressed it, "In other words, equitable estates are at present not regarded as of the special sort as to which the encouragement of free exchange is of prime social importance."[19] To the present writer, the trust machinery of property holding seems to give genuine social value in enabling property to be entrusted to the persons—the trustees,—who can best handle it so as to carry out the legitimate desires of trustors, and the social need of allowing trustors thus to provide for those in whom they are interested seems to him to entitle the trust to remain out of the list of relations as to which the "effort to ensure security in commercial transactions and acquisi-

---

the United States, California being among the states accepting it, (see Graham Paper Co. v. Pembroke (1899) 124 Cal. 117, 56 Pac. 627; Wideman v. Weininger (1913) 164 Cal. 667, 130 Pac. 421, and notes in 1 California Law Review, 364, 451) that though the rule applies between successive assignees of choses in action, so that as between them priority of notice gives priority of right, a cestui que trust is not an assignee within the rule and therefore does not lose priority acquired through being prior in time just because a subsequent assignee of the trustee gives notice first to the debtor. Eve, J., said: "The principle on which the rule in *Dearle* v. *Hall* is founded, which regards the giving of notice by the assignee as the nearest approach to the taking of possession, has no application, in my opinion, to the beneficiary who has no right to possession himself, and who can only assert his claim to receive through his trustee." [1918] 2 Ch. 273, 279.

[17] Huston, The Enforcement of Decrees in Equity, p. 127.

[18] "*Caveat emptor* is being modified by the change in social conditions into *caveat dominus:* Let the owner take care in the selection and supervision of his agent; let him watch the conduct of his trustee, at the risk of losing his property rights through their wrongdoing, if the transaction they carry through is with a bona fide purchaser." Huston, The Enforcement of Decrees in Equity, p. 128.

[19] Id., p. 131. "Trusts are a legally recognized institution because they afford an effective method of safegnarding the interests of persons who for some reason cannot efficiently protect them themselves. The trustee is selected because of his intellectual and moral competence to guard and foster these interests on behalf of their possessor." Id., p. 132. But Professor Huston seemingly considered the trustee more akin to an agent than the present writer is willing to concede is the case, despite the apparently common origin of the agent and the trustee.

tions"[20] properly applies; but whether the trust is so entitled to remain out or not, the fact is that it is out at present and that something needs to be done to remedy the bad position of cestuis in some cases and the bad position of bona fide purchasers in other cases, owing to the weak tests for priority adopted by the courts. Those tests we must now proceed to discuss.

Of the two postulates we have to consider,[21] the one which our previous discussion has shown to be logically defensible,—namely, that as between persons whose equities are equal except as to priority in time, the one having the legal title shall prevail,—is the one most frequently attacked. The English writers, particularly, seem to resent it. Their attitude has been due in part to the indefensible English doctrine of tacking of mortgages,[22] but that is not the whole explanation. Whether, at the time the misconduct of the trustee or other wrongdoer is discovered, the purchaser has or has not obtained the legal title is purely a matter of chance, and, despite their general sporting dispositions, the English dislike to have a decision turn on anything so fortuitous where neither party knowingly took a chance. The fact of the matter is that ideal justice would often divide the loss between the parties, regardless of where the legal title was, but our law (including our equity), not being ideal, foolishly insists on letting the loss fall wholly on one of them, except in a rare situation, such as where the purchaser has got the legal title but has paid only part of the purchase money before receiving notice of the trust, where the interests of each can be looked after in part. It exalts logic over justice. So far as strict legal logic is concerned, the legal title, other things being equal, must carry the day, since it is logically the business of chancery to let the loss stay where it has fallen unless the chancellor can find some superior merit, i.e., "equity," in the particular contender who starts as loser which entitles him to cast the loss upon the other.[23] Our later discussion

---

[20] Id., p. 127.

[21] The third postulate of importance in England, namely, that where the equities are otherwise equal possession of the title deeds gives priority, seems of practically no importance in the United States, and, therefore, is not discussed here. It is considered in Ewart on Estoppel, chapter XIX and the first page of chapter XX.

[22] Under the English Law of Property Act, 1922, "The existing rules as to tacking and consolidation [of mortgages] are preserved." Herbert A. Smith, The English Law of Property Act, 1922, 30 West Virginia Law Quarterly, 160, 163.

[23] It is of course apparent that the present writer does not accept Professor Huston's conclusion that equity permits a bona fide purchaser who has acquired the legal title to take free of any claim "merely because he has acquired the legal title from one who has been given a power to transfer

will reveal, however, that court action on such logic has led to very unsatisfactory results.

But what of the other postulate? Despite its frequent application and its commonly assumed verity, the doctrine that prior in time is prior in right is really a feeble affair. Why is anything to be preferred merely because it is older than something else? "First come first served" is a rule of convenience, no doubt, but it may often work great hardship on the feeble and the sick and its moral value is much diminished by the accidents which bring one person rather than another first on the scene. Professor Edward Jenks in his article on "The Legal Estate"[24] makes perhaps the best showing for the rule when he says that the principle *qui prior est tempore, fortior est jure* "is a principle founded on solid reason. The older title cannot, in the nature of things, be aware of the later: the converse is by no means true. The longer a man has enjoyed a right, either in possession or anticipation, the keener will be his suffering if it is taken away." He felt compelled to add, however, that "But even priority of time is not by any means always a perfect plea. If the prior title, though free from all moral taint, is affected with carelessness which has enabled a third person to commit a fraud upon the later title, the prior title will be postponed, though there could have been no question of notice."[25]

The rule that prior in time is prior in right is merely a rule of convenience. If nothing better offers, of course, even a rule of convenience may form the basis of decision between two otherwise equally meritorious parties, but there is no occasion to laud the rule. There need be no enthusiasm over the matter, except on the part of the one whose luck it is to be first in time. Granted that we must decide wholly in favor of one party as against the other, the doctrine that prior in time is prior in right may be applied wherever there is nothing else to go on, but only because there is nothing else. As Vice-Chancellor Kindersley said in Rice v. Rice, *supra:* "In a con-

---

it, and because equity respects such legal title as superior to the equitable title which a court of equity otherwise upholds in cestui." Huston, The Enforcement of Decrees in Equity, p. 122. Equity seems never to have regarded the legal title as superior to the equitable, but quite the reverse. Where the parties in chancery were of equal merit as to the matter involved, the chancellor simply let the law courts dispose of the matter and in consequence the legal title prevailed.

[24] 24 Law Quarterly Review, 147, 155.

[25] Id., citing and stating Walker v. Linom [1907] 2 Ch. 104, 76 L. J., Ch. 500, 97 L. T. 92.

test between persons having only equitable interests, priority of time is the ground of preference last resorted to."[26]

But that is not all. It is difficult at times to find out which equity is prior in time. One often has to resort to a doctrine of relation back to ascertain such priority in time. A good illustration is found in Eyre v. Burmester.[27] There one Sadlier, in 1854, mortgaged to Eyre certain estates in Ireland. Then in September, 1855, he conveyed the same and other estates to Burmester, et al., as trustees for a banking company to secure advances by the company, concealing from these parties the prior mortgage to Eyre and conveying the premises as free from incumbrances. Before the conveyance to the trustees was completed by registration of the deeds in Ireland, the fact of Eyre's mortgage was discovered, and the banking company refused to proceed with the loan unless Sadlier would obtain a release of the estates from Eyre, which Sadlier agreed to do. Sadlier did obtain such a release from Eyre in October, 1855, by giving the latter fictitious shares and a forged note. Sadlier did not convey the estates to Burmester, et al., after getting the release and, since under English law title did not pass in such case by estoppel,[28] the

---

[26] (1854) 2 Drewry 73, 78. See also id., 85. "But priority in point of time is of no great weight as agaiust other equities." Ross, J., in In the Matter of the Estate of William L. Bobbett and Joseph Bobbett [1904] 1 Ir. R. 461, 472.

[27] (1864) 10 H. L. Cas. 90, 6 L. T. 838.

[28] In General Finance Mortgage and Discount Co. v. Liberator Permanent Benefit Building Society (1878) 10 Ch. D. 15, 39 L. T. 600, in holding that a mortgage deed which purported to grant a freehold estate and which contained a covenant "that the mortagor has full power to grant and convey the said premises in manner aforesaid" did not create an estoppel by deed which could be fed by the subsequeut acquisition of the legal estate as against a still later mortgage, Jessel, M. R., at pp. 24-25, said that the estoppel by deed doctrine "can have no operation except in the case of third parties who are innocent of fraud and who have become owners for value; and there can be no reason—as I intimated at the beginning of my judgment—that I am aware of, for preferring one innoceut purchaser for value to another. As against the man himself [i.e., the mortgagor] or persons claiming without value, the purchaser or the mortgagee can recover without any recourse to estoppel at all; therefore, considering especially that the jurisdiction in equity and Common law is now vested in every Court of Justice, so that no action of ejectment, or as it is now called, an action for the recovery of land, ean be defeated for the want of the legal estate where the Plaintiff has the title to the possession, I think I ought not to attempt in any way to extend this doctrine by which falsehood is made to have the effect of truth. The doctrine appears no longer necessary in law; it appears no longer useful, and, in my opinion, should not be carried further than a Judge is obliged to carry it."

In an earlier part of the opinion, Jessel, M. R., said: "The whole doctrine of estoppel of this kind, which is a fictitious statement taken as true, might have been founded in reason, but I am not sure that it was. There is another kind of estoppel—estoppel by representation—which is founded upon reason, and it is founded upon decision also." 10 Ch. D. 15, 20.

legal title so reconveyed by Eyre to Sadlier remained in him until he committed suicide in February, 1856, and his fraud was discovered. When in October, 1855, Sadlier obtained the reconveyance from Eyre, Sadlier was obligated to get it and to convey the estates to Burmester, et al. But when he got the reconveyance and that obligation attached to the land in his hands, it was simultaneously affected by a constructive trust in Eyre's favor. Both those equities coming into existence at the same fractional part of a second of time, we should be unable, on principle, to choose between them at all, unless the fact that Eyre had parted with the identical property while Burmester, et al., had only parted with money could give Eyre priority, or unless the fact that Eyre's equity was the product of his original equity through money loaned and security taken in 1854 and might properly date from then, while the equity of Burmester, et al., was the product of money loaned at the earliest in September, 1855, though in any event before the release given by Eyre to Sadlier, and dated at the earliest from then, would make Eyre's equity, by relation back, the older equity. Burmester, et al., claimed that their equity dated from September, 1855, but Eyre's only from the reconveyance in October, 1855,[29] but if relation back applies to either it applies to both. By relation back then, Eyre got priority and, since Burmester, et al., did nothing after the release was obtained, all their money being advanced before Eyre consented to give the release,[30] there was no reason to disturb that priority of Eyre. The English court did not reason the matter out in that way, but instead treated Burmester, et al., as trying to benefit by Sadlier's act in cheating Eyre and, since they claimed under him, as bound to take his act as it was, with its liability to be defeated for fraud, and consequently treated Eyre as claiming against Sadlier by paramount right. Fundamentally, however, the doctrine of priority in time through relation back would seem to be a more satisfactory justification for the decision in favor of Eyre, wherever priority in time gives priority in right. That conclusion is reinforced by the fact, referred to above, that Eyre parted with the land while Burmester, et al., parted with only money. It would seem that one induced by fraud to part with the title to land has a superior claim to that land to the claim of one who a month before parted with money in the expectation of getting that title, particularly where, as in Eyre v. Burmester, at the time of parting with his money the

[29] See Lord Cranworth's opinion, (1864) 10 H. L. Cas. 106.
[30] Id., 108, 110.

purchaser claimant knew that the title was in the other. The equity arising from just having parted with the title for worthless securities gives a little larger claim to have the identical property, it would seem, than does the equity arising from paying money on the prospect of getting the property. If one equity is larger than the other, the doctrine of priority in time as giving priority in right has no application.

The fact that the English do not have in its full extent our American doctrine of title by estoppel did not require a different decision in Eyre v. Burnester from that which would properly be reached in this country in a similar situation.[31] If title by estoppel, as its name indicates, is simply an equitable doctrine,[32] it would seem clear that title should never pass under it where equitable priorities admittedly are violated by having it do so. On the other hand, if, as suggested by counsel and assumed for the purpose of argument by the court in a Connecticut case,[33] "Such estoppel by deed is not an

---

[31] "The doctrine of estoppel to assert an after-acquired title has been applied in the case of a mortgage as well as in that of an absolute conveyance, more particularly when the mortgage instrument contains a covenant of warranty or other covenant. And it has been so applied not only in jurisdictions in which the legal title passes to the mortgagee, but in other jurisdictions likewise." 2 Tiffany, Real Property (2d ed.) § 545. See Cal. Civ. Code, § 2930.

[32] "In the adoption and application of the doctrine of estoppel, it is manifest that courts have looked beyond the forms of conveyance, sought for substantial justice and the means of its promotion, and in a large class of cases found those means in the very convenient principle of estoppel. I am not aware that the principle of estoppel has ever been applied in a case in which the estoppel has been set up in virtue of a conveyance with warranty of him who afterwards received only a trust estate in the land attempted to be conveyed by him. In such case there would clearly be wanting the great principle of equity, which so manifestly lies at the foundation of the doctrine of estoppel; and I think the court would struggle hard against the applieation of the principle in a case in which such clear injustice would be the result." Woods, J., in Wark v. Willard (1843) 13 N. H. 389, 397.

[33] Wheeler v. Young (1903) 76 Conn. 44, 55 Atl. 670. "The ground upon which the doctrine of estoppel has always been applied to deeds is that it avoids circuity of action. Jackson v. Waldron, 13 Wend. 206. It had its origin in the ancient law, when the grantor, by his covenant of warrauty, was bound, upon the eviction of the grantee, to restore him lands of equal value. This has been to this day no further changed than to allow a pecuniary equivalent to be awarded in place of lands.

"But for the application of this doctrine, the grantor might with his subsequently-acquired title, oust his grantee; and the moment this was done, the right of the grantee would be perfect to compel the grantor to restore him the same or other lands of equal value; thus attaining in two suits precisely what is now attained by disabling the grantor in the first instance from using the after-acquired title to the prejudice of his grant." Ranney, J., in Lessee of Buckingham v. Hanna (1853) 2 Ohio St. 551, 557-558.

But the avoidance of circuity of actions is really an equitable doctrine, though urged in this connection by Coke in Co. Litt. § 265a, who said that circuity of action "is not favored in law," so it would seem that a legal as

equitable doctrine, but is a rule of the Common law based upon the recitals or covenants of the deed," the common law, which has been even more devoted than chancery to the doctrine that prior in time is prior in right,[34] should be even more disinclined to deprive Eyre of his relation back priority in time. That will be still more apparent after we consider the title-by-estoppel priority-of-equities cases.

But worse even than the difficulties of applying the doctrine of priority in time between otherwise equal equities is the doubt as to the soundness of that doctrine cast by the contention of Professor Ames that a bona fide purchaser for value of certain equities should acquire them free from equities.[35] No man saw more clearly than he did the fallacy of the suggestion of Lord Westbury in Phillips v. Phillips[36] that for priority purposes there is a distinction between an equitable estate and an equity,[37] and yet it would seem that he sought to give practical effect to something akin to that when he suggested that a trust of an equitable interest—a sub-trust—could be cut off by the sub-trustee's transfer to an innocent purchaser.[38] Only

---

distinguished from an equitable explanation of the title by estoppel doctrine is not adequate. See 2 Tiffany, Real Property (2d ed.) § 545, where it is said:

"The view that the conveyance operates to transfer the after-acquired title is frequently based on the theory that circuity of action is thereby avoided, the title being given to the grantee instead of compelling him to sue on the grantor's covenant for the damage caused by the want of such title. But, as before indicated, so far as the estoppel of the grantor is concerned, the presence of a covenant for title is immaterial, it being sufficient if the intention to convey a certain estate appears from any part of the conveyance, and as shown by an able writer, even when there are such covenants, the estoppel frequently operates although there is no right of action on a covenant. [Rawle on Covenants for Title (5th ed.) § 251]. The theory referred to, of avoidance of circuity of action, however satisfactory it may be in many cases, does not serve to explain the decisions as a whole, and as stated by the same authority [Rawle on Covenants for Title (5th ed.) § 264], the only satisfactory theory in this connection is that the courts have merely applied, under common law forms, the equitable principle that, where one having no title or an imperfect title, purports to convey a good title to another, and afterwards acquires the land under another title, he may be compelled to convey to such other the title so acquired. That is, if an attempted conveyance of a certain estate or interest in land is ineffective by reason of the fact that the grantor has not title to the land at the time of the conveyance, equity will regard the attempted conveyance as a contract to convey, and will compel specific performance thereof upon his subsequent acquisition of title. And the courts of this country, in so far as they regard the after-acquired title as actually passing to the grantee, have merely taken the further step of regarding as done what equity would compel to be done." There is still some truth in Coke's characterization of "estoppels" as "an excellent and curious kind of learning." Co. Litt. § 382 a.

[34] 2 Pomeroy's Equity Jurisprudence (4th ed.) § 679.

[35] 1 Harvard Law Review, 1, 9-12.

[36] (1862) 4 De G. F. & J. 208, 31 L. J., Ch. 321, 5 L. T. 655, 45 Eng. Rep. R. 1164.

[37] 1 Harvard Law Review, 1, 2.

[38] Id., 11.

an occasional case can be regarded as in any way supporting Professor Ames, if indeed any case can, and there are well reasoned cases against him,[39] but, for all that, his attack in that matter, even though weakened by an over stressing of the in personam theory of the trust relationship, reduces our faith in the soundness of the doctrine that prior in time is prior in right, already weakened, no doubt, by the cases herein above treated. It but remains to diminish our faith in that doctrine still more by showing how unsatisfactory are the results of the application of the doctrine to certain other concrete situations.

Let us assume that T^1 was a trustee for C, but without anything to give a third person notice of that fact. Then that T^1, in breach of trust, conveyed the trust res to D^1, an innocent donee, who, still in ignorance of the trust, conveyed the res to D^2, also an innocent donee, and D^2 conveyed to P, an innocent purchaser, who paid the full purchase price, which was a fair one, prior to learning of the claims of C.

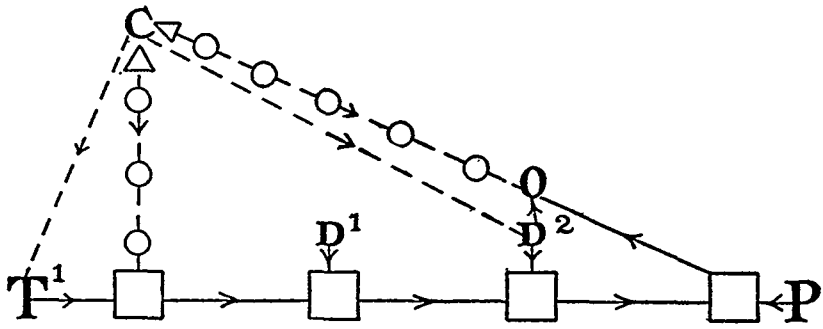

DIAGRAM No. 1

□ = the legal title. △ = the equitable title.
O = the money received by D^2 on the sale to P.
The long lines ——→—— = the course of passage of the legal title to the res and to the money.
The short lines —→— = the legal claims to the res and the money.
– – – – → – – – – = an in personam equitable claim.
—O—O→—O—O— = an in rem equitable claim.

---

[39] Duncan Townsite Co. v. Lane (1917) 245 U. S. 308, 62 L. Ed. 309, 38 Sup. Ct. Rep. 99; U. S. v. Lamm (1906) 149 Fed. 581; Taylor v. Weston (1888) 77 Cal. 534, 20 Pac. 62; Woods v. Delle (1842) 11 Ohio, 455; Cory v. Eyre, supra, n. 10; Cave v. Cave (1880) 15 Ch. D. 639. See also Jennings v. Bank of California (1889) 79 Cal. 323, 21 Pac. 852; Johnson v. Hayward (1905) 74 Neb. 157, 103 N. W. 1058.

Gibson, J., in Chew v. Barnet (1824) 11 S. & R. (Pa.) 389, 392-393, said: "Now, every equitable title is incomplete on its face; it is in truth nothing more than a title to go into chancery, to have the legal estate conveyed; and, therefore, every purchaser of a mere equity takes it subject to every clog that may lie on it, whether he has had notice of it or not."

See 2 Tiffany, Real Property (2d ed.) § 566.

P, having the legal title and having the full equity of his innocence, can keep. D^1, the first donee, incurred no liability to anyone, for he did not commit even an equitable tort in taking and conveying and of course never was a constructive trustee, since his conscience was never charged while he held the property.[40] The conscience of D^2, however, though clear as D^1's, so far as taking and conveying the land was concerned, was charged as to the purchase money after notice to him.[41] Until notice, however, his conscience was perfectly clear even as to the money. D^2, therefore, can be made by C to pay over the purchase money to T^1 or to a new trustee for C.[42] The disposition of the situation, thus outlined, seems strictly logical and also good common sense, and seems not to be controverted.

Now suppose that when T^1 was trustee for C, the trust being again one where notice of C's claims could not be brought home to one dealing with the trustee, T^1, in breach of trust, conveyed to T^2 who took in trust for P, the innocent purchaser, who paid in full, and that T^2 took the conveyance in ignorance of the trust for C.

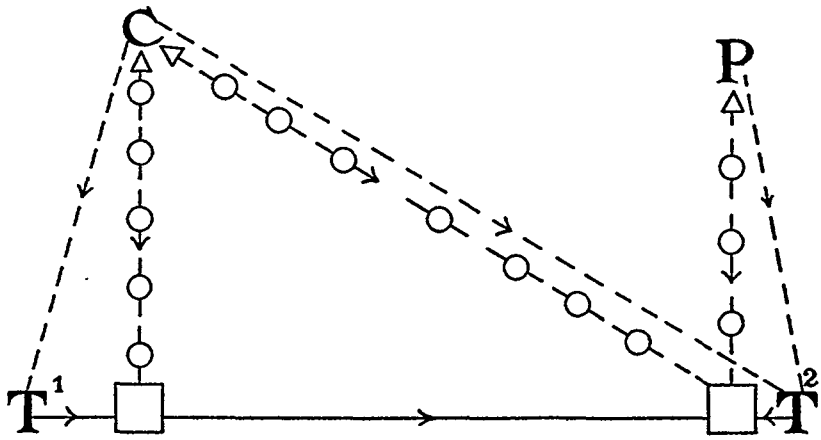

DIAGRAM No. 2
For explanation of symbols see Diagram No. 1

If, when C gave notice of his claims, T^2 still had the legal title, C would base his claim to priority in equity upon the fact that his equity was prior in time to the equity of P. If, for instance, the trust for C was created in 1922 and the purchase by P and the trust for

---

[40] Bonesteel v. Bonesteel (1872) 30 Wis. 516. Query, however, as to this conclusion if one stresses the in rem aspect of the cestui's interest?
[41] Robes v. Bent (1599) Moo. K. B. 553, 72 Eng. Rep. R. 753.
[42] Id. Cf. St. Johnsbury v. Morrill (1882) 55 Vt. 165.

him took place in 1923, C's equity, in one sense, would date back some months before P's arose. But on the in personam theory of trust relationships, at least, this apparent priority is not real. As against T^1, and as against those taking from him with notice or without value, C's equity did date from 1922, but as against T^2 and those whom he represents, C's equity dated from the notice to them of its existence, which, we will suppose, did not take place until 1924. Until notice to T^2 of C's claim, T^2 was in no sense a wrongdoer. True, he had paid nothing for the property, for P had contributed the money, but until notice of C's claims T^2's conscience was not charged by way of constructive trust, and he had not been guilty of any equitable tort. As regards T^2, P had the older equity, for his arose in 1923, and C's claim against T^2 did not arise until 1924. Here the in personam legal logic accords with the common sense view of the matter and protects P as effectually where he paid the purchase price and had the title conveyed to another in trust for himself, as he would have been protected if he had taken title in himself.[43] The strictly in rem theory is not so fortunate, for, if C's interest is strictly in rem, then it dates from 1922 and persists as against any but a purchaser for value without notice, and while T^2 was a purchaser without notice he was not one for value and while P was a purchaser for value without notice, he did not take the legal title and so has only an equity. The strictly in rem theory, then, when confronted with the doctrine that C and P each have equities and with the claim that those equities are equal, except as to priority of time as to which C has the advantage, seemingly can only insist that the equities are not equal because P has the better right to call for the legal title.[44] It cannot put up as convincing an argument for

---

[43] New Orleans etc. Co. v. Montgomery (1877) 95 U. S. 16, 24 L. Ed. 850. See Stokes v. Riley (1887) 121 Ill. 166, 171, 11 N. E. 877.

[44] In Wilkes v. Bodington (1707) 2 Vern. 599, 23 Eng. Rep. R. 991, Lord Chancellor Cowper said: "I take it to be the rule in Equity, that where a man is a purchaser without notice, he shall not be annoyed in equity, not only where he has a prior legal estate, but where he has a better title or right to call for the legal estate than the other." There the purchasers were defendants, as were also those who held the legal title in trust for them, and the bill was dismissed. Lord Chancellor Hardwick approved of the case in Willoughby v. Willoughby (1756) 1 T. R. 764, 762, 768, 99 Eng. Rep. R. 1366.

So in Medlicott v. O'Donel (1809) 1 Ball and Beatty 156, 171, Lord Chancellor Manners said of the plea of purchase for value without notice: "I have always thought that he who has the best right to call for the legal estate is entitled to this defense."

What constitutes a better right to call for the legal title must be determined largely by considerations of policy. By "the best right to call for the legal estate" is meant what in Bayley v. Greenleaf (1822) 20 U. S. (7 Wheat.) 22, 5 L. Ed. 393, Marshall, C. J., called an "equitable advantage which gives

P on the better right theory as can the in personam theory, for on the in personam theory C claims against his trustee T^1 in the first instance and against T^2 only on T^1's right,[45] i.e., C proceeds against T^2 only because of the procedural desirability of letting C join T^1 and T^2 in one action instead of C forcing T^1 to bring a separate suit against T^2 or instead of getting T^1 supplanted by a new trustee who would bring such a separate suit against T^2, and C is as subordinate in position as he would be if compelled to proceed so cir-

---

a superior claim to the legal estate." Such an advantage may be found in estoppel in pais operating against the prior equitable claimant and in favor of the one second in time (Hume v. Dixon (1881) 37 Ohio St. 66; Deuber Watch Case Mfg. Co. v. Daugherty (1900) 62 Ohio St. 596, 57 N. E. 455) or in some other equitable advantage.

In Taylor v. London and County Banking Co. [1901] 2 Ch. 231, 262-263, 70 L. J., Ch. 477, 84 L. T. 397, 17 T. L. R. 413, Stirling, L. J., said: "Now, a purchaser for value without notice is entitled to the benefit of a legal title, not merely where he has actually got it in, but where he has a better title or right to call for it. This rule is laid down in *Wilkes* v. *Bodington* [supra]. It has accordingly been held that if a purchaser for value takes an equitable title only, or omits to get in an outstanding legal estate, and a subsequent purchaser for value without notice procures, at the time of his purchase, the person in whom the legal title is vested to declare himself a trustee for him, or even to join as party in a conveyance of the equitable interest (although he may not formally convey or declare a trust of the legal estate) still the subsequent purchaser gains priority: See *Wilkes* v. *Bodington* [supra]; *Maundrell* v. *Maundrell* [(1805) 10 Ves. 246, 270, 7 R. R. 393, 32 Eng. Rep. R. 839]; *Stanhope* v. *Earl Verney* [(1761) 2 Eden. 81, 28 Eng. Rep. R. 826]; *Wilmot* v. *Pike* [(1845) 5 Hare 14, 22, 9 Jur. 839, 67 Eng. Rep. R. 808] and *Rooper* v. *Harrison* [(1855) 2 K. & J. 86, 106, 69 Eng. Rep. R. 704.]"

In Preston, Admr. v. Nash (1881) 76 Va. 1, 10, a purchaser who had fully paid for his property but had not yet received his deed was preferred over the holder of an unrecorded trust deed in the nature of a mortgage. Christian, J., declared in his opinion, in which one other judge concurred, "that a complete purchaser is one who has paid the purchase money, and who, though he has not received a conveyance of the legal title, is entitled to call for it." The other two judges based their opinion on the doctrine of equitable estoppel. Later, the majority opinion in Wasserman v. Metzger (1906) 105 Va. 744, 749, 54 S. E. 893, took issue with the above stated view of Judge Christian as being contrary to other decisions of the Virginia Court and also "in conflict with the maxim which prevails in equity as well as at law, that he who is prior in time is prior in law—that where two equities are equal the prior equity shall prevail. For if the mere fact that a subsequent purchaser has paid his purchase money and has the right to call for the legal title makes him a complete purchaser and entitles him to the protection which complete purchasers receive at the hands of a court of equity, the fact that another has an equal or superior equity, prior in point of time, will be of no avail."

In St. Johnsbury v. Morrill, supra, n. 42, equitable advantage for the purchaser whose equity was second in time was found in the fact that the purchaser not only had paid his money but had gone into possession and expended money in repairs and improvements. Cf. Williamson v. Gordon's Executors (1816) 5 Munf. (Va.) 257; Cox v. Romine (1852) 9 Gratt. (Va.) 27.

[45] See Wetmore v. Porter (1883) 92 N. Y. 76; Zimmerman v. Kinkle (1888) 108 N. Y. 282, 15 N. E. 407; Ludington v. Mercantile Nat. Bk. (1905) 102 App. Div. 251, 92 N. Y. Supp. 454; Mansfield v. Wardlow (1906) 91 S. W. 859 (Tex. Civ. App.).

cuitously. On the in personam theory, therefore, C's claim against T^2 is indirect until that notice to T^2 which gives rise to a direct constructive trust claim by C against T^2, while until such time, and thereafter, P's claim is direct and in so far preferable; but on the strictly in rem theory P, it would seem, must rely solely on the fact that C's claim against T^2 is one of constructive trust while P's claim is one of express trust. No doubt the two kinds of trusts are very different. The express trust is consensual; the constructive trust is a mere device for preventing or redressing unjust enrichment.[46] But when they compete for place, which kind of trust is entitled to advantage of position? As between two people only, one a cestui and the other a trustee, the court will not "construct a trust" on the unjust enrichment theory if an express trust can be found, the enforcement of which is possible and which will give the cestui all he ought to have; but where there are three people, one a trustee and the other two cestuis, and of the cestuis one is the beneficiary of an express trust and the other of a constructive trust recognized or created because of a prior express trust, is there any sound reason for giving precedence to the express trust? It would seem not, and it would seem fair to say that the common sense desirability of giving P the advantage in the situation discussed has probably helped to conceal from the advocates of the strictly in rem theory, if there are any such advocates, the weakness of P's case on their theory. Probably, however, there are no advocates of a strictly in rem theory, since of necessity the in rem theory supporters recognize that the trust relationship is also strongly in personam in nature, albeit with strong and to them perhaps predominating in rem features.[47] Those who envisage this double aspect of the trust relationship are entitled

---

[46] "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." Cardozo, J., in Beatty v. Guggenheim Exploration Co. (1919) 225 N. Y. 380, 386, 122 N. E. 378.

[47] "But of course it will be admitted that the existence of a personal right against the trustee—a genuine obligation-right—may be consistent with the possession by cestui of right *in rem* also. He may have a personal right against the trustee and property rights in the *res*, just as a principal has rights *in personam* against his agent and rights *in rem* against persons generally as to the property he has entrusted to that agent. It is not determinative of the question whether or not cestui has rights *in rem*, that he has also rights *in personam* against his trustee." Huston, The Enforcement of Decrees in Equity, p. 115.

"Rights may be rights *in rem* even though on some particular individuals (such as the bona fide purchaser for value of the legal title) they do not impose a correlative duty." Id., p. 127. For instances outside of the law of trusts, see id., pp. 124-125.

of course to all the benefit of arguments of priority advanced by the champions of the in personam theory. Those arguments give P the advantage because his claim against T^2 is direct from the start and, as a direct claim, antedates C's. The authorities also favor P in this situation.[48]

But now let us vary the last situation by supposing that when P bought and took title in T^2 in trust for P, T^2 knew, but P did not, of C and his claims. What, then, is the situation? It seems clear that when T^2 took with notice, he took as constructive trustee for C, but, by supposition, at that very same time T^2 took as express trustee for P. If an express trust per se outweighs a constructive trust, P will prevail, but in discussing the last situation we were forced to deny any such advantage to express trusts. In view of that denial, what is the result? Finding that the express trust and the constructive trust arise in the same fractional part of a second of time, are we unable to choose between them? There is still the fact that the constructive trust is the resultant of the earlier express trust, i.e., exists solely because of the violation of that earlier express trust, and that fact should be deemed to give the constructive trust priority by relating it back in time to the express trust of which it is the product. On that theory, even if a trust be regarded as essentially an in personam relation, C will be given priority, for, while, as to time of actual creation, C's equity has no advantage over P's, both equities being direct claims against T^2 and for the specific res, there is the earlier express trust of C's, which is the occasion and the cause of the constructive trust for C, to give the latter trust, by relation back, priority in time over the equity of P. P can claim the legal title only from T^2 and can claim it at most with only the infirmities it possesses in T^2's hands and, therefore, subject to the trust to C, so we refuse to recognize P's claim. On the strictly in rem theory, too, the conclusion that C has priority seems clear. Common sense probably is satisfied, also, as it seems fair to bind P, despite his actual innocence, with the knowledge which his trustee T^2 had.

But it is necessary to consider another situation. If C was cestui and T^1 was his trustee under an express trust and T^1 conveyed in breach of trust to P and later P or some one who derived title from P should convey the property back to T^1, the latter would again be trustee for C.[49] But now suppose that P, when he conveyed back to T^1, did so on an express trust for P.

---

[48] See supra, n. 43.
[49] Kennedy v. Daly (1804) 1 Sch. & Lef. 379; Bourguin v. Bourguin

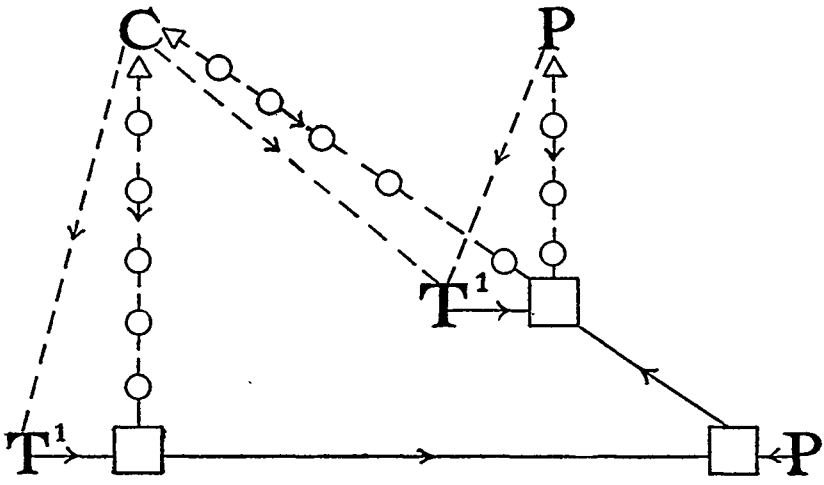

DIAGRAM No. 3
For explanation of symbols see Diagram No. 1.

Naturally T^1 knew of C, though P did not, and C insists that the trust for him is the old trust that antedated P's appearance on the scene and so C is entitled to priority. Moreover, C points out that there is no indirection of claim. On the in personam theory, both C and P are claiming against the same man, T^1, and while both have otherwise equal equities, C's is prior in time. On the strictly in rem theory, C's equity was cut off when P took title, and while it is fair to give C a new in rem right when T^1 takes title again in his own right, it may not be fair to do so where he takes again only in trust for another. Even though it may be said that the strictly in rem view is probably held by nobody, still one who stresses the in personam side of the true double aspect view of the trust relationship, must reach a different result here from that arrived at by one who stresses the in rem aspect. On the in personam theory, T^1's equitable tort in conveying to P did not kill C's equity but merely left it in a state of suspended animation and it revived. On that theory, strict legal logic would seem to favor C, since T^1, taking with notice of C's claims, cannot keep for P any more than for

(1904) 120 Ga. 115, 47 S. E. 639; Williams v. Williams (1898) 118 Mich. 477, 76 N. W. 1039; McDaniel v. Spreck (1923) 249 S. W. 611 (Mo.); Clark v. McNeal (1889) 114 N. Y. 287, 21 N. E. 405, 11 Am. St. Rep. 638; Church v. Ruland (1870) 64 Pa. 432; Cf. Talbert v. Singleton (1871) 42 Cal. 390; Huling v. Abbott (1890) 86 Cal. 423, 25 Pac. 4; Phillis v. Gross (1913) 32 S. D. 438, 143 N. W. 373. See 2 Pomeroy's Equity Jurisprudence (4th ed.) §754; 2 Tiffany, Real Property (2d ed.) p. 2258, n. 94.

himself. On the in rem theory, T^1's equitable tort killed C's in rem equity and it need not be resurrected as against P. In such a diversity of results from opposing theories, common sense may step in and favor P. The cases cited on the next problem would clearly support the priority of P.

The next situation involves title by estoppel, and gives added evidence of the feebleness of the doctrine of priority in time as giving priority in right. Let us suppose that in 1923 P bought from G for $10,000 in cash the farm known as Blackacre, G giving P a general warranty deed, both G and P supposing that G had title, though in fact G did not have title and therefore P did not acquire title. Then suppose that in January, 1924, X, in ignorance of the foregoing transaction, conveyed Blackacre to G in trust for C.

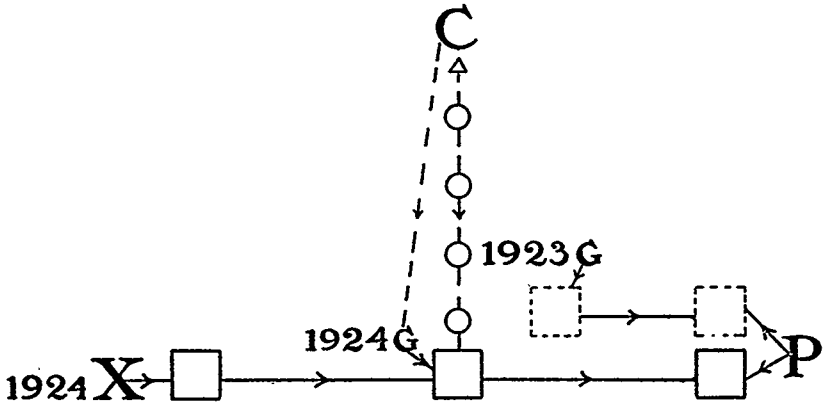

DIAGRAM No. 4

□ = Inchoate title to be completed by an after-acquired title if that can pass by estoppel.

For other symbols see Diagram No. 1

Normally, under our American doctrine of title by estoppel, a grantor, who has purported to convey by general warranty deed where he has no title and who afterwards gets title, will be "estopped" to say that the after-acquired title has not passed to the grantee. The authorities are divided as to the effect of the estoppel on the title. The majority of the cases say that it actually passes to the grantee without court action and without delay,[50] but a minority of

[50] Somers v. Skinner (1825) 3 Pick. (Mass.) 52; White v. Patton (1837) 24 Pick. (Mass.) 324. Under section 1106 of the California Civil Code it is provided that "Where a person purports by proper instrument to grant real property in fee-simple, and subsequently acquires any title, or claim of title

the cases say that it does not pass though the estopped grantor will not be allowed to deny that it has passed and title can be quieted as against him.[51]

In the minority title by estoppel jurisdictions, it would seem clear that in 1923 P got an "equity" to have the title to Blackacre from G. In 1924, for the first time, C, as cestui, got an equity to have the title to Blackacre held by G for C. P's equity was the older equity. Should it prevail? Unless in some way C's equity can be deemed superior, it would seem that P's must prevail. It is, however, only where the equities are "otherwise equal" that priority in time gives priority in right. Are, then, the equities "otherwise equal"? C's "equity" is a well known, highly respectable interest, in origin in personam and by evolution, in at least one aspect, in rem. P's equity is merit on his part plus a power to keep G from claiming the title in G's own right, and in the latter respect is in personam. Title by estoppel is a doctrine closing G's mouth in so far as G seeks to claim for G. But just as the doctrine of *in pari delicto* is no defense to a suit by a blameworthy trustee brought in behalf of a blameless cestui,[52] so the claim of estoppel, which would be good against G individually, cannot properly close G's mouth so far as he speaks for C or some other interested and unestopped third person. If that is a fair way of regarding it, then P's equity is smaller than that of the cestui, C, and so is inferior to that equity.

But what of the majority jurisdictions? If title actually passes by estoppel, is the doctrine of title by estoppel really equitable? Maybe it started as such, but has ceased to be of that nature because the law courts have taken it up. In any event, since title passes in

---

thereto, the same passes by operation of law to the grantee or his successors." See Younger v. Moore (1909) 155 Cal. 767, 103 Pac. 221; Bernardy v. Colonial and U. S. Mtge. Co. (1904) 17 S. D. 637, 106 Am. St. Rep. 791. For other state statutes see Stimson, American Statute Law, § 1454. For other cases stating the majority view, see Rawle on Covenants for Title (5th ed.) § 248; 21 C. J. 1087.

[51] Burtners v. Keran (1873) 24 Gratt. (Va.) 42; Jordan v. Chambers (1910) 226 Pa. 573, 75 Atl. 956. For other cases stating the minority view, see Rawle on Covenants for Title (5th ed.) § 248; 21 C. J. 1086.

[52] See Wetmore v. Porter, supra, n. 45, where the maxim "Ex turpi causa non oritur actio" and allied maxims were considered. In Francis Oil and Refining Co. v. David A. Manville Co. (1924) 296 Fed. 349, 352, which raised somewhat the same question in regard to a corporation and its shareholders, the special relation of trustee and cestui not being involved, Mayer, Circuit Judge, said: "Indeed, where the wrong goes beyond the parties themselves, and particularly where the plaintiff seeking recovery is in some relation to others whereby his participation in the wrong injures them, the courts reach below the surface in the desire to protect the injured. Wetmore v. Porter, 92 N. Y. 76, 21 C. J. 189; Saylor v. Crooker, 97 Kan. 624, 156 Pac. 737, Ann. Cas. 1918 D, 473."

the jurisdictions under discussion, instead of remaining in the grantor with an inhibition normally against his asserting the fact to be so, and, in consequence, in such jurisdictions, it is the common law judge, and not the chancellor, whose judgment must be persuaded, a slightly different argument must be advanced from that which served in the other kind of jurisdictions. To be sure, the common law judge no longer ignores equities, but he is more interested in the common sense of the matter. Indeed, that would seem to be why so many cases fail to give any reason for refusing to let the title by estoppel doctrine defeat C in the situation under consideration and content themselves with brief assertions of the manifest justice of their holdings.[53] One case, shortly to be discussed, does attempt to say that C's equity was older than P's under the special facts of the case, but that argnment is unconvincing even under those special facts.[54] Clearly P's equity was the older and unless C's is the larger, P must prevail on the basis of relative equities. P's equity, as we have just seen in discussing the minority jurisdiction cases, is purely personal against G, while C's equity is in one phase in rem. That fact may establish the superiority of C's equity.[55] But even if C is a donee cestui, he has still another claim of superiority for his equity. It is an equity which he has because of X. Now X had the legal title, with the legal privilege of bestowing it on any willing recipient, and X is entitled not to have his intended gift to C snatched away in the instant of its giving by another person such as P, who is not a creditor or transferee of the donee. What C lacks in merit as a donee, X supplies as a donor and supplies in such a way that C may claim that merit as part of the gift. P's merit consists of the innocent payment of money, made in the past in the expectation of acquiring the particular land, but X's merit, passed on to C, consists in having actually parted

---

[53] See Phillippi v. Leet (1893) 19 Colo. 246, 35 Pac. 540, 542, where the court spoke of the "proposition so manifestly just and equitable."

[54] The case is Burchard v. Hubbard (1842) 11 Ohio, 316. Whether the actual decision is sound depends largely on the view which one takes as to the requirements of the recording statutes.

[55] In Newton v. Easterwood (1913) 154 S. W. 646, 652 (Tex. Civ. App.), Hodges, J., for the court said: "In filling gaps in the chain of title the law, when left to its own operation, supplies the missing link only where the parties themselves should execute the proper and necessary conveyances, and have failed to do so. Kelley v. Jenness, 50 Me. 455, 79 Am. Dec. 623; Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449; 3 Wash. on Real Prop. (3d ed.)111. One who relies upon estoppel for an after-acquired title can have no greater right than has the grantor against whom the estoppel is claimed. Fretelliere v. Hindes, 57 Tex. 392. Again, a title of estoppel can be urged only against those who are estopped by the facts relied on."

with the land itself for a specific purpose. The equity of the man who is handing over the land in trust for his intended donee becomes the equity of that donee and is a bigger equity than that of the man who, albeit previously, merely handed over money.

One of the interesting American cases is Kelley v. Jenness.[56] There the plaintiff Kelley was a second mortgagee, the deed to him containing the usual covenants of general warranty. The first mortgage was held by one Blake. The defendant Hill paid through the mortgagor, Jenness, the money due to Blake, expecting an assignment of the Blake mortgage to be made to himself, or to someone for his benefit. Blake, however, had promised Kelley's attorney to assign to no one but the mortgagor, Jenness, and therefore he assigned to Jenness. A trust, which was either resulting or constructive, attached to the assigned interest in Jenness' hands and the question was whether that trust would prevail, or whether the arrangement with Blake that he should assign to Jenness, and the assignment actually made thereunder to Jenness, would inure to the benefit of plaintiff Kelley by force of the estoppel created by the covenants in his mortgage. Treating it as a case where the legal title was in Blake as first mortgagee, the court asked whether a title in trust—here a title on either a resulting or a constructive trust—was such an after-acquired title as would inure by way of estoppel. The court held not, because "there can be no division or separation in the effect of the assignment. . . . The assignment was charged with the trust, as soon as executed."[57] The court treated the case as on all fours with one where the assignment is expressly in trust for a designated beneficiary, in which latter case the court thought it could hardly be contended that the title taken on express trust could inure as an after-acquired title to the trustee's warranty deed grantee.[58] It seems clear that the second mortgagee knew of

---

[56] (1862) 50 Me. 455, 79 Am. Dec. 623.

[57] Id., 466.

[58] Other resulting or constructive trust cases which deny that title will pass by estoppel to the injury of such a trust any more than to the injury of an express trust are Dewhurst v. Wright (1892) 29 Fla. 223, 10 So. 682; Fretelliere v. Hindes (1882) 57 Tex. 392; Newton v. Easterwood (1913) 154 S. W. 646 (Tex. Civ. App.); Gregory v. Peoples (1885) 80 Va. 355. Cases denying that title will pass by estoppel to the injury of an express trust are Kelley v. Jenness, supra, n. 56; Haslam v. Jordan (1908) 104 Me. 49, 70 Atl. 1066; Marsh v. Rice (1818) 1 N. H. 167; Runlet v. Otis (1820) 2 N. H. 167; Burchard v. Hubbard, supra, n. 54. See also Phillippi v. Leet, supra, n. 53; Bridgewater v. Ocean City Assn. (1915) 85 N. J. Eq. 379, 96 Atl. 905; Wark v. Willard (1843) 13 N. H. 389; Sinclair v. Jackson (1826) 8 Cow. (N. Y.) 543; Lessee of Buckingham v. Hanna, supra, n. 33; Balch v. Arnold (1899) 9 Wyo. 17, 59 Pac. 434.

the existence of the first mortgage when he took, and so consented to be in subjection to that, unless the covenant of warranty in the second mortgage warranted against the first mortgage. Consequently the decision might be supported on the ground that the equities of the parties were not equal, plaintiff's being inferior to that of Hill. But the other reason is vital in other cases involving only title by estoppel, though in Kelley v. Jenness it is raised in a form which favors the cestui more than is true in the ordinary case. When Hill purchased the right of Blake as mortgagee, in expectation of an assignment, Hill got the equity of Blake with its age as an essential part. Or, more exactly, Hill's equity as resulting cestui, while it arose at the time of the payment of the purchase price and the assignment to Jenness, being one that was the outgrowth of the purchase of Blake's equity, was entitled to be related back in time of origin and order of precedence to the creation of Blake's equity. Kelley's equity, on the contrary, had no history and nothing to which to relate it back, so dated at the earliest from its own creation, which was subsequent to that of Blake's equity, and so was subsequent to that of Hill's equity as related back in time to the equity of Blake.

One other American case, that of Burchard v. Hubbard,[59] deserves special consideration. There in July, 1834, one George F. Whittaker, who some years before had conveyed the land to one Isaac Whittaker and had since then acquired no claim to the property except one under an invalid tax deed, contracted to sell the land to Hubbard. In March, 1835, Burchard agreed to buy the same land from Isaac Whittaker, Isaac to convey to George F. Whittaker and the latter to convey to Burchard so as to convey the tax title. Burchard paid the whole purchase money in March or April, 1835,[60] and on April 12, 1835, a deed to the property from Isaac Whittaker to George F. Whittaker was left with the lawyer who had been consulted as to the best method of conveying. June 24, 1835, Hubbard paid George F. Whittaker in full and received from him a deed of the property which was recorded June 26, 1835. The opinion of the court states[61] that the deed from Isaac Whittaker to George F. Whittaker, though dated April 12, 1835, was not delivered until August, 1835. It was on November 3, 1835, that George F. Whittaker deeded to Burchard. In 1838 Hubbard conveyed to his co-defendant Brooks. The court held the tax deed to be invalid,

[59] Supra, n. 54.
[60] See counsel's statement, 11 Ohio, 316, 322.
[61] Id., 333.

so that George F. Whittaker had no title when Hubbard dealt with him. Neither Burchard nor Hubbard had any notice of the transaction with the other, and, Burchard having filed a bill to quiet title, the problem of priority of equities was presented. Birchard, J., for the court, said:

> "Had George F. Whittaker acquired for himself the legal and equitable title, he would, by reason of the warranty contained in his deed, have been estopped at law from denying the title of Hubbard, and, in chancery, his conveyance to Hubbard would have been held binding on his conscience.
>
> "We are asked to extend and apply this rule, as against the complainant. To do so, in the state of facts here existing, would be pushing it beyond reason. The equity of the complainant is equal to that of the respondents. He had no notice of their rights; his purchase did the respondents no harm; it did not mislead them. The deed in fact was not delivered to George F. Whittaker, but went into the hands of Dickinson, the agent and attorney of the complainant, who received it, and delivered it to the complainant, by whom it was put on record. If the doctrine of estoppel could apply, it would vest no better title in Hubbard than George F. Whittaker himself acquired, that is, a trust estate.
>
> "In equity, he who is prior in time, other things being equal, hath the better right. Tried by this rule, complainant has the better equity in the lands. He purchased of the rightful owner, and paid his money. Hubbard bought of a stranger to the title. His payments were completed on June 24, 1835, at which time he took his deed from a stranger, who had nothing but a void tax title. This created no equity to the lands then owned by Isaac Whittaker. Before this time, complainant had become interested in the land by purchase, and payment of the money to Isaac, the real owner."[62]

The argument seems to be that since Hubbard bought from one who had no title, no equity as to the land could arise until his grantor actually got the title—i. e., no in rem equity could arise until then—and before such in rem equity could arise in Hubbard's favor, Burchard, through a contract of purchase made with the real owner of the land, had acquired an in rem equity, so Burchard's equity was the older. The court in that case used "equity" in a restricted sense not sanctioned by the authorities. Merit, whether or not an equitable title exists, is the equity which the chancellor talks of in the case of "equal," or "otherwise equal," equities. Hubbard's merit was, by relation back if in no other way, older than Burchard's,

---

[62] Id., 332.

but, apart from any difference made by the recording statute, Burchard's might well be deemed of superior quality since Hubbard's deed gave rise, presumably, to only a personal estoppel against his grantor, while Burchard's equity was in one phase in rem. There was no third person, such as X was in the case discussed in connection with diagram No. 4, to turn the scale in Burchard's favor, unless Isaac Whittaker, despite the fact that he was simply a paid-in-full grantor, can serve as a quasi-X, but Burchard's equity seems larger than Hubbard's prior equity. The question, however, is close and one's view as to the intent and effect of the recording act may well dictate his position as to it.

A consideration of the effect of the recording acts on equities is needed to complete our discussion of equities. While the authorities on the title by estoppel problem are all one way where the grantor sought to be estopped takes his after-acquired title in trust for a third person,[63] the cases under the recording acts, where successive grantees of record are competing for priority, divide, with perhaps the majority of jurisdictions giving the preference to the first grantee. The question is as to the intent of the recording acts about the extent of search required of the second grantee, a problem affected in part by the nature of the indexing system, i. e., whether locality or grantor-grantee, kept by recorders in the particular jurisdiction. Some jurisdictions which do not seem to have a locality indexing system require, however, as complete a search as do those which have that system. The Connecticut Court, in Wheeler v. Young,[64] giving effect to an idea previously expressed by Judge Hare in a note to Smith's Leading Cases,[65] decided that the first grantee was negligent in not discovering from the record that his grantor had no title and then concluded that under the registry laws the second grantee was "only required to search against each owner during the time he [such owner] held the record title."[66] The

[63] See supra, n. 58.
[64] Supra, n. 33.
[65] 2 Smith's Leading Cases (8th Amer. ed.) p. 848.
[66] This is, however, the minority view. The argument for it, namely, the distance back of a given party's acquisition of title for which conveyances from him must be searched and the naturalness of a failure to make such search, is given in Bingham v. Kirkland (1881) 34 N. J. Eq. 229 and in Richardson v. Atlantic Coast Lumber Corporation (1912) 93 S. C. 254, 75 S. E. 371. See Rawle on Covenants for Title (5th ed.) § 259. The argument for the majority view is that an estoppel should and does bind "not only the parties but all privies in estate, privies in blood and privies in law" [Tefft v. Munson (1874) 57 N. Y. 97, 99; Douglass v. Scott (1831) 5 Ohio, 195, 198; Jarvis v. Aikens (1853) 25 Vt. 635], and the majority courts do not feel that they are violating the recording acts in so deciding, though some of them—see for instance McCusker v. McEvey (1870) 9 R. I. 528—

necessity of enforcing legislative intent would seem to prevent the use of these recording act cases to turn the scale one way or the other in our general discussion of relative equities, but they deserve to be mentioned here because of their practical bearing in the United States on the priority of equities in real property.[67]

We must notice finally a problem on which there seems to be no authority but which is dealt with by writers in one way in England and perhaps inferentially in the opposite way in this country. It is the problem concerned with whether a person is to be charged with notice of trusts created by a deed in his chain of title when the grantee in such deed, i. e., the trustee taking on the trusts specified, conceals that deed and forges a deed to himself from his grantor which makes the title appear to have been conveyed to him without restrictions, conditions or trusts of any kind. It is assumed that the present holder, sought to be charged with the trust set forth in the suppressed deed, relied on the forged deed, without actual negligence on his part, and paid full value for the property in ignorance of the trust. The best statement of the English view is found in the following quotation from Maitland's Equity:

> "We will put two cases which in the eyes of the moralist may seem closely similar but between which the lawyer will see a vast difference. (1) A is tenant in fee, B is occupying his land as his tenant at will; B forges a complete set of title deeds showing that he is tenant in fee; he sells the land to X; X diligently investigates the title, finds nothing suspicious, pays his purchase money and takes a conveyance. (2) T is tenant in fee holding land in trust for S; T forges title deeds concealing the trust and showing him to be simply tenant in fee subject to no equitable liability; he sells to Y, who investigates the title; the forgery is clever and it deceives him, he pays his money and takes a conveyance. The two cases may be like enough to the moralist but how different to the lawyer. In the first, A is legal owner of the land and X has had the misfortune to buy from one who had nothing to sell, to take a conveyance from one who had nothing to convey. In the other case the purchaser is the legal owner of the land, and having come to legal ownership *bona fide* for value and without notice, actual or constructive, of S's rights, S has no equity against him; S's only remedy is against the fraudulent trustee.

---

admit that they are opposing the spirit while conforming to the letter of those acts. For the cases pro and contra, see 2 Tiffany, Real Property (2d ed.) pp. 2130-2131; 21 C. J. 1088.

[67] For a special case where the recording act did not eliminate questions of competing equities, see Dedeaux v. Cuevas (1914) 107 Miss. 7, 64 So. 844.

"Observe now that this is the effect of the legal estate. Suppose that in the second of the two cases, after the fraudulent trustee has contracted to sell, the *cestui que trust* hears of this and informs the purchaser of it before the purchaser gets the legal estate. Now the case is very different even if the purchase money has been paid. Neither purchaser nor *cestui que trust* has legal ownership; the *cestui que trust's* right is merely equitable, the purchaser's right in the land is merely equitable; the *cestui que trust's* right is the older right and it prevails. As between merely equitable interests in land, the rule is 'qui prior est tempore potior est jure'—the older equity is the better. But let the purchaser get the legal estate without notice, there is no place for this maxim."[68]

But to an American lawyer the problem contains a difficulty not faced in that statement by Maitland. That difficulty is one of letting the present holder of the title in Maitland's supposititious case (2), namely, Y, keep free from the trust when one of the deeds which he must rely on to bring to him the legal title—an essential deed in his chain of title—is the deed creating the trust. The problem may be best presented, perhaps, by quoting from Pomeroy's Equity Jurisprudence. Pomeroy says:

"§ 626. Wherever a purchaser holds under a conveyance, and is obliged to make out his title through that deed, or through a series of prior deeds, the general rule is firmly established that he has constructive notice of every matter connected with or affecting the estate which appears, either by description of parties, by recital, by reference, or otherwise, on the face of any deed which forms an essential link in the chain of instruments through which he must derive his title. The reasons for this doctrine are obvious and most convincing; in fact, there could be no security in land ownership unless it were strictly enforced. The right of such a purchaser is, under our system of conveyancing, confined to the instruments which constitute his chain of title, which are his title deeds, and everything appearing in those instru-

---

[68] Maitland's Equity, pp. 129-130.

Compare the recording act problem suggested by Professor Kidd for California, in which state a mortgagee does not get the legal title yet the trustee under a deed of trust to secure a debt does get it. Professor Kidd's case is as follows:

"A grants to B, in trust for C in order to secure payment of a note to C. The deed is not recorded. B then forges a deed absolute from A to B and records the same. B then conveys the property to D, a bona fide purchaser. Would the courts accept the logical consequences of the legal title theory and give D the property, or would they hold that a trust deed passes no title to convey, except in subordination to the trust"? A. M. Kidd, Trust Deeds and Mortgages in California, 3 California Law Review, 381, 397. Conceivably a court might answer the problem put by Maitland as he did and yet regard a deed of trust to secure a debt as so like a mortgage as not to require Professor Kidd's problem to be answered in the same way.

ments and forming a legitimate part thereof is a necessary element of his title. The *rationale* of the rule is equally clear and certain. Any description, recital of fact, reference to other documents, puts the purchaser upon an inquiry; he is bound to follow up this inquiry step by step, from one discovery to another, from one instrument to another, until the whole series of title deeds is exhausted, and a complete knowledge of all the matters referred to in their provisions and affecting the estate is obtained. Being thus put upon the inquiry, he is conclusively presumed to have prosecuted it until its final result, and with ultimate success. The purchaser's ignorance that a particular instrument forming a link in his chain of title was in existence, and his consequent failure to examine it, would not in the slightest affect the operation of the rule. An imperative duty is laid upon him to ascertain *all* the instruments which constitute essential parts of his title, and to inform himself of all that they contain.

"§ 627. The notice which thus results from recitals and other matters contained in title deeds, within the operation of the general rule, is absolute in its nature. The party having been put upon an inquiry, the presumption that he obtained a knowledge of *all* the facts which could be ascertained by means of a diligent inquiry prosecuted through the entire chain of title deeds, and through all the instruments referred to, is conclusive; it cannot be rebutted by any evidence of a failure to discover the truth, nor even by proof of ignorance that instruments affecting the title were in existence. This presumption extends to unrecorded documents as well as to those which have been duly recorded.

"§ 628. Where, under the operation of the foregoing general rule, a purchaser has notice of a title deed, he is presumed to know all its contents, and is bound thereby."[69]

At first sight that language seems to say that the American courts will give a solution to the case stated by Maitland quite different from the one that Maitland gives, but careful scrutiny of the statements made by Pomeroy show that such is not a necessary consequence. His "rationale of the rule" shows that the purchaser

---

[69] 2 Pomeroy's Equity Jurisprudence (4th ed.) §§ 626, 627, 628. See also 2 Tiffany, Real Property (2d ed.) § 572, where it is stated that "In so far as a purchaser has actual or constructive notice of a conveyance or other instrument executed by one previously owning or claiming to own the land, he is charged with notice of all matters stated or referred to in such conveyance, which may possibly affect the title, and he is bound to make any inquiries or researches suggested by such statements or references. For this purpose a purchaser is charged with notice of any conveyance which occurs in the chain of title under which he claims, that is, he is charged with notice of all matters stated or referred to in any conveyance which is essential to support his claim without reference to whether he has actual notice of such conveyance. And the fact that such conveyance in the chain of title is not of record is immaterial in this regard."

is only required to know what is in deeds the existence of which he is bound to know, and that his ignorance of the fact that any one of such deeds is in existence, so that he could examine it, will not enable him to rely on lack of knowledge of the deed's contents.[70] Pomeroy was not thinking or speaking of the case where the purchaser sees an apparently complete chain of title, which is free from matters of notice and yet actually gets title through a deed not in that apparently complete chain, which deed is itself a deed creating the equity sought to be enforced against him. Such purchaser is not "put upon an inquiry" as to the suppressed deed, is not bound to know of such a deed, and actually does not know of it, by supposition, until after the title vests in him, and then it is too late to diminish his already acquired merit which we call his "equity" and wrest from him his innocently received legal title. Such statements as those of Pomeroy are the result of extreme statements in American cases which should have been less sweeping. In Stees v. Krauz,[71] for instance, where the question was whether a covenant in a lease, which was also a condition in the lease, that no spirituous or malt liquors should be kept for sale or vended as a beverage by the lessees, their heirs, administrators or assigns, could be enforced by injunction against a sub-lessee of part of the premises, when said sub-lessee took his sub-lease in ignorance of such clauses in the lease and on the assurance of the original lessees that they had full power to rent the premises to him to use for a restaurant and to sell wines and liquors in connection therewith, Gilfillan, C. J., said:

> "It is immaterial that the lease was not recorded, or that in fact the defendant had no notice of the covenants in it. No rule is better settled than this: that one is bound by whatever affecting his title is contained in any instrument through which he must trace his title."[72]

---

[70] The details of the argument for charging the purchaser with notice of the contents of documents in the chain of title are perhaps as well stated in Johnson v. Thweatt (1851) 18 Ala. 741, 747, as anywhere. There Dargan, C. J., said: "The principle is well settled, that when a purchaser cannot make out his title but by a deed which leads him to another, he cannot be a purchaser without notice of this other deed, and of course of all its provisions. A purchaser has the right to call for and examine the chain of title to the land he is about to purchase; and if he neglects to do this and purchases without seeing the deeds, through which he is to receive title, it is his own folly; in the language of the authorities, it is crasa negligentia, and he cannot protect himself from the consequences of notice, by insisting upon his own folly, or neglect."

[71] (1884) 32 Minn. 313, 20 N. W. 241.

[72] 20 N. W. 241, 243.

Such cases as this, and it is typical of those cited to support the doctrine, clearly go no further than to say that a purchaser must look through the documents which he is bound to know constitute his chain of title and do what a prudent man would do in regard to references in those documents. They do not stand for the proposition that however much he is imposed upon by clever forgeries and however careful he is in going through the conveyances in his apparent chain of title, he is still chargeable with notice of that which he cannot possibly ascertain. Some of the other judicial utterances show this. In Burwell's Adm'rs v. Fauber,[73] Moncure, P., said:

> "Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. Caveat emptor is one of the best settled maxims of the law, and applies exclusively to a purchaser. He must take care, and make due enquiries, or he may not be a bona fide purchaser. He is bound, not only by actual, but also by constructive notice, which is the same in its effect as actual notice. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a bona fide purchaser without notice."[74]

That it is proper to charge the purchaser with notice of everything contained in the documents in the only chain of title that he could be told about if he inquired, and also is proper to charge him with that notice even if the documents or one or more of them are unrecorded, would seem to be perfectly clear. That it is proper to charge the purchaser with notice of the contents of such a document though it is unrecorded and he does not have the faintest idea where it can be found or whether it is in existence or of whom to inquire is perhaps less clear.[75] But as a common sense matter, it is all

---

[73] (1871) 21 Gratt. (Va.) 446, 463.

[74] Id., 463.

"The principle of equity is well established that a purchaser of land is chargeable with notice, by implication, of every fact affecting the title, which would be discovered by an examination of the deeds or other muniment of title of his vendor, and of every fact, as to which the purchaser, with reasonable prudence or diligence, ought to become acquainted. If there is sufficient contained in any deed or record, which a prudent purchaser ought to examine, to induce an inquiry in the mind of an intelligent person, he is chargeable with knowledge or notice of the facts so contained." Leonard, C., in Cambridge Valley Bank v. Delano (1872) 48 N. Y. 326, 336.

[75] For a case where a purchaser was charged with notice of a reservation of a vendor's lien in a deed in the chain of title though the deed was not recorded and had long since been lost or destroyed and he had no actual

wrong to protect a bona fide purchaser where the trust is contained in a separate written instrument not referred to in a deed in the chain of title and to refuse to protect him where he is imposed upon by a cleverly forged chain of title but actually does get the title under a trust deed which he had no means of knowing existed or was needed by him. And even if it be conceded that the propositions of constructive notice in cases designated above in this paragraph as "perfectly clear" and as "perhaps less clear" are sound, it still seems as if Maitland's solution of the problem stated by him is correct. Nevertheless, the fact that the purchaser is saved here by our making, albeit with reluctance, an exception in his favor to the general rule of constructive notice to purchasers of everything in the documents on which such purchasers must actually rely to get title, makes us realize still more the weakness of the justice, even while we must admit the logical correctness, of the doctrine that as between two persons having equal equities the one having the legal title shall prevail. Too often the purchaser profits too much by his ignorance.[76]

In running through the foregoing, we have seen extremely fine distinctions drawn and we have found common sense at times opposed to legal logic and the strictly in rem theory of a trust sometimes calling for a different conclusion from the one necessitated by the in personam theory. One emerges with a feeling of dissatisfaction with the solution of the problems discussed which is not at all decreased by recalling other erratic outcomes of cases which apply the doctrine that as between those having equal equities the holder of the legal title shall prevail. One is forced to assent to the logic of that last doctrine, but is disgusted by finding that the results of its application turn so completely on mere chance. Is not there something wrong with the premises which logically compel such fortuitous consequences? Is it so clear that, in a contest between a cestui and a bona fide purchaser from the cestui's trustee,

---

notice of its contents, see Moore v. Scott (1896) 38 S. W. 394 (Tex. Civ. App.). The case, however, was one where had the purchaser inquired as to the deeds in the chain of title he must have learned of this one and could have ascertained its terms and the amount for which the vendor had a lien. That there may be some limit as to even such constructive notice, see Crofut v. Wood (1875) 3 Hun. (N. Y.) 571.

[76] "In the *Solicitors' Journal* for 1909 (vol. liv), at page 130, there is an article on 'The Purchaser for Value Without Notice,' and the conclusion of the writer is that 'the legal estate is little, if anything, more than an idea, which interferes with the judicial awarding of property to the person really entitled'." James Edward Hogg, The Legal Estate in English Property Law, 22 Juridical Review, 55.

one or the other must take the whole? May not the chancellor as a new Solomon divide the babe between them? It is not the kind of a babe that would be harmed by an effective decree to divide. This question is asked, of course, on the assumption that the equities are "otherwise equal." Professor Jenks seemed to think that the doctrine that prior in time is prior in right is superior to the doctrine that the legal title shall prevail,[77] but it seems impossible to assent to that view. Both doctrines are weak and unsatisfactory, and our real trouble comes from the disinclination of chancery to divide the loss. Where the legal title prevails, the chancellor can quiet his conscience by talking about letting the loss stay where it has fallen, and where there are merely competing equities he can speak of priority in time as giving priority in right, but in each situation he leaves us unconvinced as to the essential justice of what he does. In his article on "The Legal Estate," Professor Edward Jenks has said that

> "In fact, it would seem that there is a large class of cases, of which *Pilcher* v. *Rawlins*[78] is a typical example, where neither the technical rule [that as against a purchaser for value of the legal estate, without notice, and without negligence, no equitable interest of however long standing is of any avail],[79] which was applied in that case, nor the rule of *prior in tempore,* represents the highest effort of the human mind in search of justice.[80] Why should not, in such cases, the loss be equally divided between the innocent parties? No doubt the adjustment would not always be very easy; but the machinery of the Chancery Division, at any rate, performs more complicated functions, in dealing with administrative actions, than most of such cases would require. Or again, why not adopt the principle that a *cestui que trust* is absolutely bound, as against innocent strangers, by his trustee's misconduct? That would be an intelligible proposition; though, doubtless, it would work hardly in some cases."[81]

The alternative of holding a cestui absolutely bound, as against innocent strangers, by his trustee's misconduct would seem to be as inimical to the essential nature of trusts as we found the so-called es-

---

[77] In 24 Law Quarterly Review, 155, he speaks of the principle *qui prior est tempore potior est jure* as "a principle founded on solid reason."

[78] (1872) L. R. 7 Ch. 259, 41 L. J., Ch. 485, 25 L. T. 921.

[79] Jenks, The Legal Estate, 24 Law Quarterly Review, 147, 149.

[80] Professor Jenks points out "that the real absurdity of the doctrine on which *Pilcher* v. *Rawlins* was decided is best shown by the fact that, up till the last moment, it lay in the power of a rogue [by conveying the legal title or withholding a conveyance] to decide, perhaps by the mere toss of a coin, which of two innocent parties should bear the consequences of his fraud." Id., 156.

[81] Id., 155.

toppel theory to be. Indeed, it is practically the same thing in disguise. But the other suggestion, that some division of the loss, normally an equal division, be made in these purchaser for value cases, seems quite consistent with the nature of a trust, and with the essential function and duty of the chancellor. It merely stresses the often overlooked but valuable maxim that "equality is equity."

What is contended for here is, in substance, that as between the holder of an equity and a subsequent purchaser for value, the general rule should be that neither priority in time nor the fact that the purchaser has happened to receive, or has failed to receive, the legal title shall be a determining factor and that whenever, in consequence, the equity judge shall find himself unable to give preference to either of such parties, he should divide the loss between them. It might possibly be provided, however, that if the prior equity claimant is an infant or insane or is sufficiently subnormal in intellect, or is otherwise clearly demonstrated to be so incompetent as to be in special need of protection, and the subsequent equity claimant is under no such disability, the rule that as between otherwise equal equities prior in time is prior in right should still be applied. It might be found, also, that in deciding priorities or equalities as between parties having equities the courts would have to come to agreement as to which phase, if any, of the double aspect of the cestui's interest should always be emphasized, since one aspect may lead to one result and the other to a different one. Whether one aspect should always be emphasized can only be determined, however, after sufficient experience under the other changes herein advocated.[82]

One may appropriately apply to the two postulates that "as between otherwise equal equities prior in time is prior in right" and

---

[82] If the courts are not confined to letting either the in personam or the in rem aspect of the cestui's interest prevail in all bona fide purchaser situations, the difficulty will be that the courts will tend to emphasize the in personam aspect in one case and the in rem aspect in another similar case because of varying impressions as to which particular litigant ought to prevail. The problem does not seem to be one of accuracy in jurisprudential analysis, for on such analysis the equitable interest of a cestui clearly has both in personam and in rem aspects, but rather whether it is essential to the proper administration of justice according to law to have the courts in the purchase for value cases always emphasize one of those aspects and, if so, which aspect. Under existing rules we found that the in personam aspect should be stressed in the situation under diagram No. 2, and the in rem aspect under diagram No. 3, and experience may well show that even after the abandonment of the two postulates considered here it may be important to stress the in personam aspect at one time and the in rem at another. But the choice of the aspect to emphasize in a given case should be governed by rule instead of being dictated by caprice.

that "as between equities that are equal, except as to priority in time, the legal title shall prevail" language as severe as that which Lord Shaw of Dunfermline used recently in speaking of the English rule of the Coronation procession cases, that is, the rule that supervening impossibility releases the parties from further performance of the contract affected, but the contract remains good and enforceable to that point. In explaining that rule in Chandler v. Webster,[83] one of the Coronation procession cases, Collins, M. R., said:

> "The rule adopted by the Courts in such cases is I think to some extent an arbitrary one, the reason for its adoption being that it is really impossible in such cases to work out with any certainty what the rights of the parties in the event which has happened should be. Time has elapsed, and the position of both parties may have been more or less altered, and it is impossible to adjust or ascertain the rights of the parties with exactitude."

In speaking of that so-called explanation, Lord Shaw of Dunfermline, in Cantiare San Rocco, S. A. v. Clyde Shipbuilding and Engineering Co., Ltd.,[84] said:

> "Thus the rule, admitted to be arbitrary, is adopted because of the difficulty, nay the apparent impossibility, of reaching a solution of perfection. Therefore, leave things alone; potior est conditio possidentis. That maxim works well enough among tricksters, gamblers, and thieves; let it be applied to circumstances of supervenient mishap arising from causes outside the volition of parties: under this application innocent loss may and must be endured by the one party, and unearned aggrandisement may and must be secured at his expense to the other party. That is part of the law of England. I am not able to affirm that this is any part, or ever was any part of the law of Scotland.
>
> "No doubt the adjustment of rights after the occurrence of disturbances, interruptions, or calamities is in many cases a difficult task. But the law of Scotland does not throw up its hands in despair in consequence and leave the task alone."

It is time for Anglo-American law to address itself with alertness of mind and conscience to the task of doing real justice as between the equally innocent.

"Because error is gray with age is no reason why it should be respected or followed," it has been said,[85] and while there may be no apparent prospect of getting rectified the specific kind of hoary error which refuses to sanction the equity of equality by dividing

---

[83] [1904] 1 K. B. 493, 499, 73 L. J., K. B. 401, 90 L. T. 217, 20 T. L. R. 222.
[84] [1924] A. C. 226, 259, 260.
[85] Canty, J., in dissenting in Germania Bank v. Boutell (1895) 60 Minn. 189, 62 N. W. 327.

the loss between the equally meritorious, and which bases that refusal on the two postulates herein attacked,[86] it still may be worth while to insist that this ancient error be seen for what it is; for only if and when error is comprehensively studied and its evil consequences fully understood can the hope be indulged that in some unforeseen way it will be mended.

George P. Costigan, Jr.

School of Jurisprudence, University of California.

[86] See 22 Harvard Law Review, 151.